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In The
Supreme Court of the United States

STUART H. SMITH, JR.,

Petitioner,

versus

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARIE HEALEY
Counsel of Record
DANIEL A. SMITH
HEALEY & SMITH,
A Professional Law Corporation
650 Poydras Street, Suite 2345
New Orleans, Louisiana 70130
(504) 581-6700

JOHN M. SINGLETON
General Counsel
INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS
700 Maritime Boulevard
Linthicum Heights, Maryland 21090
(410) 850-8700

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The questions framed by Petitioner for review do not accurately reflect the proceedings below, as Respondent shows hereinafter:

1. **Whether the six-month limitation period for presenting claims pursuant to 29 U.S.C. §160(b) [of] the National Labor Relations Act applies to a contract action brought in a State Court, and is applicable to a claim for breach by the Petitioner, a licensed Merchant Marine Officer and Supervisor, not considered an employee under 29 U.S.C. §152(3).**

The manner in which this issue is framed invites assumptions not supported in the Record and the decisions of the courts below. **First**, though the Smith action was **filed** in a Louisiana state court, it did not state a Louisiana cause of action but rather a federal one alleging violation of the Union's duty of fair representation. The action was therefore timely removed to federal district court as preempted by §301 of the Labor Management Relations Act, 29 U.S.C. §185. Neither court below disputed that removal, nor did Petitioner seek remand. Both courts held that the complaint alleged a federal violation of the duty of fair representation ("DFR") owed by Respondent, a labor organization, to Petitioner, a member of the bargaining unit covered by the then-current collective bargaining agreement in effect between Respondent and Petitioner's employer. **Second**, because Petitioner did not allege his supervisory status precluded application of the §10(b) statute until reaching the appellate court, the district court issued no fact findings or legal conclusions on his actual status. However, the

QUESTIONS PRESENTED FOR REVIEW – Continued

recognition clause of the collective bargaining agreement at issue stipulates "Licensed Deck Officers, including Master [sic]," to be "supervisory and professional," (Rec. 000226).

2. **Assuming, arguendo, that the six-month limitation period under §160(b) does apply to Plaintiff's claim, whether Respondent's refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions, tolled the limitation period.**

This question is ambiguous and confusing in that it questions whether Respondent's **refusal** to arbitrate Petitioner's grievance had the effect of suspending or "**tolling**" the commencement of the §10(b) statute of limitations. The district court held that the Union **did** communicate its refusal to arbitrate, the effect of which was to cause the statute of limitations to **commence** its running. The district court further held that no conduct of the Union had the effect of extending the processing of the grievance in view of the Union's January 11, 1994 notification (Pet. App. 19) that it refused to process the grievance further.

PARTIES TO THE PROCEEDINGS

The following is a complete listing of all parties to the proceedings in the court of appeals for the Fifth Circuit:

1. Stuart H. Smith, Jr.

2. International Organization of Masters, Mates and Pilots

Petitioner's statement that Waterman Steamship Corporation was also a party to the proceedings in the court below is therefore in error.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THESE PROCEEDINGS BY THE COURTS BELOW

The Opinion from which Petitioner seeks certiorari is officially reported as follows:

1. *Stuart H. Smith, Jr. v. International Organization of Masters, Mates and Pilots*, 297 F.3d 380 (5th Cir. 2002).

The Opinion in its unofficial form is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari at Pet. App. 1-7. All citations made herein are to the unofficial Opinion included in Petitioner's Appendix.

The above-described Court of Appeals' decision affirmed summary judgment granted in the United States District Court in favor of Respondent herein, filed November 9, 2001, as follows:

2. *Stuart H. Smith, Jr. v. International Organization of Masters, Mates and Pilots*, ____ F.Supp ____ (E.D. La. 2001) (filed November 9, 2001) (No. 01-1257).

   The district court's opinion has not been officially reported to date, but is unofficially reported at 2000 WL 1414983 and 145 Lab. Cas. ¶11,215.

The district court's opinion is also reproduced in Petitioner's Appendix at Rec. App. 8-20.

STATUTES AT ISSUE

1. Labor Management Relations Act ("LMRA"):

§301(a), 29 U.S.C. §185(a):

> (a) **Suits by and against labor organizations**
>
> Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. **National Labor Relations Act ("NLRA", "The Act"):**

§2(3), 29 U.S.C. §152(3) (reproduced at Pet. 2).

§10(b), 29 U.S.C. §160(b) (reproduced at Pet. 2-3).

3. **Employee Retirement Income Security Act ("ERISA"):**

§502, 29 U.S.C. §1132(a)(1)(B):

(A) **Persons empowered to bring a civil action**

A civil action may be brought–

(1) by a participant or beneficiary –

. . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;. . . .

STATEMENT OF THE CASE

As a result of damage sustained by the SS Stonewall Jackson on October 3, 1992, and his subsequent discharge, Petitioner Stuart H. Smith, Jr. ("Smith") filed a grievance against his employer, Waterman Steamship Corporation ("Waterman") through his bargaining representative, International Organization of Masters, Mates and Pilots ("the Union"). The grievance was first asserted on October 7, 1992, through Smith's counsel, Ralph E. Smith ("Ralph Smith"). At that time, Smith was a member of the bargaining unit defined by the collective bargaining agreement then in effect between the Union and Waterman, among other employers. That agreement empowered the Union to bring a grievance either on its own behalf or on behalf of a unit member, and authorized the Union to pursue arbitration should a grievance not be resolved to the Union's satisfaction.

Smith and the Union, each through counsel, exchanged correspondence thereafter spanning the period October 7, 1992 through January 11, 1994. During the same period Smith made efforts to procure from the Coast Guard a copy of its investigative report concerning the incident, but succeeded only in obtaining "the greater part of the file", as he reported in his letter of June 21, 1993 (Rec. 000340) to Union counsel. Smith's letter also withdrew his prior request (Rec. 00059) for the Union's processing of the grievance to be held in abeyance, demanding that the Union proceed to arbitration. By written response of June 28, 1993 (Rec. 000342), Union counsel Ernest Allen Cohen ("Cohen") advised Ralph Smith briefly of the steps through which the Union must proceed in order to assert the grievance against Waterman and eventually decide whether or not to take the matter to arbitration

should no satisfactory resolution be reached. To that end, Cohen requested a copy of the "Coast Guard file and any other relevant materials" in Smith's possession – that is, the partial file Ralph Smith had on June 21, 1993 identified as warranting his arbitration demand. Ralph Smith's subsequent letter of July 9, 1993 (Rec. 000062) purports to furnish this "Coast Guard record" to the Union on that date. But ¶12 of Cohen's Affidavit offered in support of the Union's summary motion in the district court contrarily asserts no documents were actually received by the Union (Rec. 00160).

One week later, on July 16, 1993, Smith filed in the federal district court a seaman's wrongful discharge claim against Waterman in which Waterman counterclaimed against Smith for damages to the vessel.[1] When Ralph Smith subsequently called upon the Union to defend Smith on this counterclaim in the federal court proceedings, Cohen rejected the demand, on December 6, 1993, as baseless in the absence of supporting authority for doing so (Rec. 000344). In response, on December 13, 1993, Ralph Smith renewed his demand upon Cohen for arbitration (Rec. 00347).

---

[1] On January 4, 1994, the district court dismissed Smith's unfair discharge claim against Waterman (Rec. 175-76) and the dismissal was subsequently affirmed by the Court of Appeals for the Fifth Circuit (Rec. 164-68). Dismissal of a subsequent action filed by Smith against Waterman to set aside the earlier district court judgment, claiming there had been a fraud on the court, also failed. This decision was similarly affirmed by the Court of Appeals for the Fifth Circuit, *Smith v. Waterman Steamship Corp*, No. 091-30442 (Summary Calendar, unpublished) [introduced by Respondent in the appellate court pursuant to 5th Cir. Rule 47.5.4 as the law of the case] (Resp. App. 1-6).

On **January 11, 1994** (Resp. App. 7-10), the Union unequivocally notified Ralph Smith by letter that it refused to pursue the grievance further, citing Smith's decision to abandon the grievance procedure in favor of a common law action against Waterman outside the parameters of the collective bargaining agreement. Smith offered no response and there was no further contact between the parties prior to Petitioner's filing of this action on April 12, 2001.

The district court thereafter granted the Union's motion for summary judgment, confined strictly to its argument that the six-month statute of limitations specified in §10(b) of the NLRA applied. The district court agreed both that the action was one for breach of the Union's DFR and that the §10(b) statute applied. The court also ruled that the statute commenced to run on January 11, 1994, when Cohen advised Ralph Smith it refused to process the grievance further, and that the statute had therefore expired by the time suit was filed (Pet. App. 19).

The court of appeals[2] affirmed the district court's grant of summary judgment in favor of the Union, specifically characterizing Smith's cause of action as one for breach of the Union's DFR (Pet. App. 4). In reliance on *DelCostello v. Int'l Bro. of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281 (1983), the court held that the §10(b) statute of limitations applies both to an employee's "hybrid" suit

[2] The only issue presented on Smith's appeal was, "Whether the District Court was in error in dismissal of the action based on the six-month prescriptive period in the National Labor Relations Act."

against his employer and his union, as well as to an employee's DFR claim standing alone. *Id.*

The appeals court also addressed Smith's claim that the §10(b) limitations period should not be applied to him because he is a supervisory employee excluded from the §2(3) statutory definition of "employee" and therefore unable to assert unfair labor practice charges against the Union under §8 of the NLRA. The court held that Smith's status as a supervisory employee is "entirely irrelevant here because Smith brought this duty of fair representation claim under §301, to which §10(b) certainly applies" (Pet. App. 5). The court determined (Pet. App. 6):

> . . . , as a statute of limitations, §10(b) applies only to particular causes of action, not to particular types of people. . . . Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor.

It is from the above Judgment that Smith now appeals to this Honorable U.S. Supreme Court, again arguing the §10(b) limitations period cannot be applied to him as a supervisory employee and, further, that the Union's refusal to proceed to arbitration on his behalf "tolled" the statute in any event.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals presents no question for review that meets the standards defined by Rule 10, Rules of the Supreme Court for granting certiorari.

Rule 10 plainly sets out the compelling reasons upon which the Court may normally grant Writ of Certiorari – a writ that is "not a matter of right, but of judicial discretion." Yet Smith offers no such compelling basis for the grant requested in these proceedings. He merely disputes the decision of the courts below, relying on the same arguments and the same judicial authorities. While Smith fails to identify the precise basis under Rule 10 for his Petition, he impliedly asks the Court to exercise jurisdiction on the basis of subsection (a) of Rule 10 – that is, that the decision below conflicts with that of another United States court of appeals, arguing at page 14 of his Petition that:

> The Court of Appeal found that SMITH's status as a supervisor was not relevant because, he brought a suit under 29 U.S.C. §185(b). The Court noted that 29 U.S.C. §160(b) applies only to particular causes of action, not to particular types of people. **That is to say, notwithstanding the limited application of 29 U.S.C. §160(b) to nonsupervisory personnel, the finding of the Court is in conflict with the decisions in the Second, Third, and Ninth Circuits which have clearly found licensed officers to be supervisors and not employees under the Act.** [*Emphasis added.*]

It is assumed that Smith's authorities for the latter assertion are the judicial citations noted at footnote 1 of page 9 of his Petition.

But no such conflict is apparent. In the course of these proceedings, neither the court below nor the Union has ever at any time disputed the proposition that supervisors are not covered by §8 of the NLRA, or that they are not recognized as statutory employees under §2(3) who may pursue §8 unfair labor practice claims against their employers or against the labor organizations that represent them. In the decision below, the court of appeals expressly held (Pet. App. 6) that Smith's status as a supervisor "would preclude him from bringing an action against the Union for violation of §8 of the NLRA," citing *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980). *See also Delta Queen Steamboat Co. v. Dist. 2, MEBA*, 889 F.2d 599 (5th Cir. 1989). This position is fully consistent with similar decisions in other federal courts of appeal specifically recognizing Licensed Deck Officers as supervisory employees not within the protection of §2(3). *See, e.g., Jensen v. Farrell Lines*, 625 F.2d 379 (2d Cir. 1980); *Dente v. Intl. Org. Masters, Mates and Pilots*, 492 F.2d 10 (9th Cir. 1974), *cert. denied,* 94 S.Ct. 2607.

These precedents plainly demonstrate that there is no conflict whatever between the holdings of the courts of appeals for the Fifth, the Second and the Ninth Circuits. All unequivocally agree that supervisors may not assert unfair labor practice claims under §8 of the Act. Nor has Petitioner cited any rulings of these courts contrary to the decision of the court below that supervisory employees pursuing DFR claims are subject to the §10(b) statute of limitations. No other basis for conflict has been identified by Petitioner, and Respondent perceives none. Consequently, no compelling reason of the nature required under Rule 10 supports Petitioner's application for certiorari.

2. It is well settled that the §10(b) statute of limitations is applicable to DFR suits brought by any employee against his bargaining representative.

Petitioner's status as a supervisory employee accords him no special consideration as a DFR litigant: if he wishes to assert a DFR claim, he may expect treatment under the law that is neither more liberal nor less restrictive than that available to a statutory employee. Section 2(3) does not deprive or relieve a supervisor or the union that represents him of the rights also extended to or responsibilities imposed upon statutory employees under other titles of the NLRA. *District 2, MEBA v. Amoco Oil Co.*, 554 F.2d 774 (6th Cir. 1977). In *Amoco*, 554 F.2d at 779, the Court of Appeals for the Sixth Circuit held:

> We hold that a union representing a bargaining unit comprised exclusively of supervisors, within the meaning of 29 U.S.C. §152(11), is a "labor organization representing employees" entitled to invoke federal jurisdiction under 301(a).

Accordingly, Smith's inability to assert rights under §8 of the NLRA that are extended only to §2(3) statutory employees does not preclude his right as a supervisory employee to assert a DFR claim under §301 against the labor organization that acts as his bargaining representative. *Delta Queen Steamboat Co. v. Dist. 2, MEBA, supra; Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989); *Dente v. Intl. Org. Masters, Mates & Pilots, supra*; *Jensen v. Farrell Lines, Inc., supra.*

Moreover, when a supervisory employee does assert a DFR claim – one "implied under the scheme of the National Labor Relations Act," *DelCostello v. International Bro. of Teamsters, supra*, 462 U.S. at 163, 103 S.Ct. at

2290 – he is equally bound by the same six-month statutory limitation period established under *DelCostello* that applies to all DFR plaintiffs, as the court below explicitly held (Pet. App. 4):

> Smith argues that §10(b) cannot be applied to him because he was a supervisory employee. Smith's status as a supervisory employee is entirely irrelevant here because Smith brought this duty of fair representation claim under §301.

The court below held, further:

> . . . as a statute of limitations, §10(b) applies only to particular causes of action, not to particular types of people. By its express terms, it applies to §8 causes of action. *See* 29 U.S.C. §160(b). It applies to §301 and duty of fair representation claims **by analogy**. *See DelCostello*, 462 U.S. at 167. Section 10(b)'s six-month period of limitations applies to Smith's suit against the Union whether or not he was a supervisor. [*Emphasis added.*]

Petitioner's Petition does not seek to reverse the lower court holdings in this matter that his action states a DFR claim under §301. That being the case, *DelCostello* must be applied, and his claim is subject to the six-month §10(b) limitation period this Court has established.

Smith nevertheless seeks to persuade this Honorable Court to reverse *DelCostello*'s holding that the most analogous claim to a DFR action is an unfair labor practice charge brought under Section 8 of the NLRA, which requires application of the §10(b) limitations period, suggesting instead that the ten-year statute applicable to personal actions under La. Civ. Code, Art. 3499 should be substituted in this action. But this and similar statutory

limitations alternatively proposed in *DelCostello* were fully analyzed and firmly rejected, as the appellate court held (Pet. App. 4):

> Where there is no federal statute of limitations, federal courts will normally "borrow" from the most closely analogous state statute. *See DelCostello*, 462 U.S. at 158. Sometimes, however, state limitation periods do not provide a satisfactory means of enforcing federal law. Where state rules would be at odds with the purpose and operation of federal law, courts will draw statutes of limitations from either related federal statutes or from the federal common law. *See id.* at 162. This is the case with respect to an employee's suit against his employer and his union, to which the six month limitations period in §10(b) applies. *See DelCostello*, 462 U.S. at 155; *Thomas v. LTV Corp.*, 39 F.2d 611, 622 (1994).

In *DelCostello*, this Honorable Court specifically determined that the most analogous **state** action is not a state contract or "personal" action, but a legal malpractice claim, 462 U.S. at 167, 103 S.Ct. at 2292. Nevertheless, the Court rejected the legal malpractice analogy as inadequate in the context of labor relations litigation, *id.*, and selected instead the federal limitations period applicable under §10(b). While the Court specifically declined to rule on whether all DFR actions constitute unfair labor practices, 462 U.S. at 170, it nevertheless recognized that "the family resemblance is undeniable, and indeed there is a substantial overlap." Accordingly, it ultimately held the §10(b) statute was a more suitable source from which to borrow than any other alternative. *DelCostello*, 462 U.S. at 169. The Court below agreed (Pet. App. 5).

In *Erkins v. United Steelworkers of America*, 723 F.2d 837, 839 (11th Cir. 1984), the court held that the similarity of rights and considerations recognized by the Supreme Court in *DelCostello* "exists even more clearly when a claimant brings only a breach of duty of fair representation claim against a union." The court went on to find, citing *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63, 101 S.Ct. 1559, 1564 (1981), that the §10(b) limitations period equally governs a DFR action whether brought alone or in context of a "hybrid" §301 action against the employer and a DFR action against a union. The court below also adopted the position that the §10(b) statute applies to a DFR claim against a union standing alone (Pet. App. 4), consistent with prior-established precedent in the Fifth Circuit. *See e.g., Richardson v. United Steelworkers of America, supra*; *Degan v. Ford Motor Co.*, 869 F.2d 889, 892 (5th Cir. 1989); *Jones v. Truck Drivers Local Union 299*, 748 F.2d 1083 (5th Cir. 1984); *Ranieri v. United Transportation Union*, 743 F.2d 598 (5th Cir. 1984); *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170 (5th Cir. 1989).

Yet Smith continues to assert that the La. Civ. Code Art. 3499 statutory period, because previously applied to "labor litigation" (Pet. 11) that he perceives as parallel to a DFR action, should govern his DFR action. However, the labor cases cited by Smith (Pet. 12, fn.5) do not support this argument and in fact are completely inapposite. *Kennedy v. Electricians Pension Plan, IBEW No. 995*, 954 F.2d 1116 (5th Cir. 1992), involved a past-service credit benefit claim by participants in a multiemployer pension plan brought under §502(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA"); no claim was brought by an employee against a union nor did the action

assert DFR claims. In *Carpenters Local Union No. 1846 v. Pratt Farnsworth [on remand]*, 609 F.Supp. 1302 (E.D. La. 1984), the Union plaintiff sought to enforce, against an employer and its alleged alter ego, the employer promise set out in a collective bargaining agreement to pay contributions owed to the multiemployer funds sponsored by the union and all employers subject to the same agreement. Again, no claim was brought by an employee against a union nor did the action assert DFR claims. Thus, Petitioner's reliance on *DelCostello* (Pet. 12, fn.5) for the proposition that La. Civ. Code Art. 3499 also applies to Smith's DFR action against his union alleging failure to represent him adequately, is woefully misguided. Substantively and in terms of the actions asserted, *Kennedy*, *Pratt Farnsworth* and the instant case are not remotely alike.

The Court's decision in *DelCostello* has been long accorded the greatest of respect. It remains unchallenged to this very day. It is routinely and faithfully observed by all lower federal courts and has lent immeasurable stability and reason to the oft-times acrimonious grievance process and the law of the shop. There is absolutely no reason to reconsider or disturb this decision, and Smith has raised no acceptable basis, compelling or otherwise, for the Court to do so. Smith's DFR claim should be subjected to the same §10(b) analogous limitations period that is uniformly applied by federal courts to the DFR claims of statutory employees and supervisory employees alike.

3. The six-month limitations period commenced to run when the Union advised Petitioner it refused to process Smith's grievance further.

Following more than a year of written communication between Smith's and the Union's respective counsel, and

irrespective of whether the Union was by law culpable in the DFR breach so precipitously assessed by the district court against the Union[3], all that is relevant is whether or not the Union notified Smith of its refusal to process the grievance further. That issue is not subject to dispute. On January 11, 1994, the Union clearly and unambiguously notified Ralph Smith that it refused to process Smith's claim further (Resp. App. 7-10), and the district court so found (Pet. App. 19). Smith did not subsequently contest this finding in the court of appeals.

Consequently, it was on January 11, 1994 that Smith's cause of action accrued. *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170 (5th Cir. 1989); *Farr v. H.K. Porter Co.*, 727 F.2d 502 (5th Cir. 1984). This, then, was the time for Smith to file the DFR action that he belatedly filed on April 12, 2001. If he disagreed with the Union's January 11, 1994 decision, his proper course of conduct was to file within the following six months a hybrid §301 breach of contract action against Waterman along with a DFR action against the Union for refusing to process his grievance

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[3] The Court will bear in mind that the court below did not rule on the Union's cross-appeal requesting reversal of the district court's finding that the Union breached its DFR because it –

> . . . had a duty as the collective bargaining agent to bring Mr. Smith's grievance to arbitration. By requesting numerous documents, and by not bringing the matter to resolution, the Union acted in perfunctory fashion. . . .

Pet. App. 15. The cross-appeal claimed the district court finding had been issued *sua sponte* and without notice in violation of Rule 56 of the Federal Rules of Civil Procedure. The court of appeals determined the cross-appeal was moot, in view of its affirmation of the district court's dismissal of the action as time-barred.

further[4]. He not only failed to do so, but continued to sit on his rights indefinitely until, having apparently exhausted all other claims available to him, he turned his attention to the Union once more and filed this lawsuit on April 12, 2001, more than seven years later and well outside the applicable six-month statute that expired on July 10, 1994.

4. The Union took no action to toll the running of the §10(b) statute of limitations. But assuming hypothetically that it did, its January 11, 1994 refusal to arbitrate inevitably commenced the running of the statute.

Smith questions whether (according to his perception of the facts at issue) (Pet. at i):

> . . . [the Union's] arbitrary refusal to proceed to arbitration, or cooperate with Petitioner in the production of evidence, in light of the Coast Guard's actions tolled the limitation period.

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[4] It is traditional for DFR litigants to sue both their employer and their bargaining agent, since "the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 103 S.Ct. at 2281. Therefore, Smith would have had to prove that he had been unfairly discharged by Waterman **and** that the Union had breached its DFR in subsequently processing the grievance. Since the district court in Smith's July 16, 1993 action against Waterman had already determined he had been discharged for cause, it may have proven rather difficult for him to sustain the requisite burden of proof in a DFR action. He must still assume that burden in the event this Court, or any other, subsequently determines his suit should be permitted to proceed on the merits.

Any suggestion that the Union arbitrarily refused to proceed to arbitration, even if based on a district court finding that the Union "had a duty" to arbitrate Smith's grievance that resulted in breach of its DFR, may not be raised before this Court today. Though the issue of whether the Union did act arbitrarily was cross-appealed by Respondent in the court of appeals, the court determined the cross-appeal to be mooted by its finding that Smith's suit was time-barred. Moreover, Petitioner's assertion that the Union refused to "cooperate with Petitioner in the production of evidence" is utterly without basis, for no court has made any such finding.

Nevertheless, Smith's formulation of this issue underscores the divergent expectations of the parties throughout the grievance process and in this subsequent litigation concerning the proper role of the Union and that of the grievant's private counsel in the processing of Smith's grievance against Waterman.

A Union's refusal to take a grievance to arbitration by no means establishes a DFR breach, for an employee has no absolute right to compel his union to arbitrate. *Vaca v. Sipes*, 386 U.S. 171, 191-92, 87 S.Ct. 903, 917-18 (1967); *Landry v. Cooper T. Smith Stevedoring Co.*, 880 F.2d 846 (5th Cir. 1989). Consequently, the Union had no obligation to respond affirmatively or immediately to Smith's demands for arbitration. And when the Union did eventually decide not to arbitrate, its basis for refusing, contrary to Smith's claims, was not his failure to produce the Coast Guard's ultimate decision on its investigations of the decision, which was not issued until 1999, or his apparent refusal – conceded to be an issue of fact – to produce the partial Coast Guard file Ralph Smith had already admitted was in his possession. More importantly, it was his

abandonment of the grievance mechanism in July, 1993 in favor of direct unfair discharge litigation against Waterman.

And the Union was certainly not obligated and assumed no obligation whatever to "cooperate" with the grievant's attorney in first acquiring and then providing documents to him for the apparent purpose of aiding his outside litigation against Waterman. Furthermore, the Union had neither opportunity nor right to subpoena testimony from other Waterman employees, especially when it had not even committed to arbitrate. Rather, the grievance process contemplates it is the grievant's right and obligation to supply to his bargaining agent any documents or other information he believes may support his unfair discharge. Based in part upon the information furnished by the grievant and the documentation it is able to obtain elsewhere, including the employer, the union must then make its own decision on **whether** to arbitrate. That decision will be made with reference to all the facts and information made available to it from all sources, as well as its evaluation of its chances of ultimately prevailing, the likely benefit to grievant, and the benefit that may flow to the unit as a whole.[5] *Stevens v. Moore Business*

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[5] The Union will not presume to explain the arbitration process to this Court, which has recognized and established that the contractual grievance machinery "is at the very heart of industrial self-government." *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581, 80 S.Ct. 1347, 1352 (1960). Suffice it to say that the concept of an arbitrator's entertaining discovery requests prior to his appointment, or a federal court's enforcement of such discovery, is not only foreign to the process but quite unworkable.

Forms, Inc., 18 F.3d 1443, 1447 (9th Cir. 1994); *White v. General Motors Corp.*, 1 F.3d 593, 595 (7th Cir. 1993).

Be that as it may, Smith's entire argument for tolling borders on frivolous, for the Record is incontrovertible in this one very important factual respect: the Union **did** advise Smith, on January 11, 1994 that it would not pursue his grievance further, and that notification commenced the running of the statute, irrespective of what had transpired before that time. As the district court held (Pet. App. 19):

> The only way that this suit is timely under the applicable six-month statute of limitations is if the Plaintiff was first notified on or after October 2000, that the Union was not bringing his matter to arbitration. Given the fact that the last correspondence with the Union stating that the matter was not proceeding to arbitration occurred on January 11, 1994, the Plaintiff knew his matter was not proceeding to arbitration before October 2000. Therefore, the Plaintiff's action is time-barred.

5. Conclusion.

Based on the foregoing arguments, the Union respectfully urges the Court to deny the petition for certiorari so as to leave standing the decision issued by the Court of Appeals for the Fifth Circuit, dismissing Smith's DFR

action as time-barred by the applicable §10(b) six-month statute of limitations.

Respectfully submitted,

HEALEY & SMITH, A PROFESSIONAL LAW CORPORATION

MARIE HEALEY
Counsel of Record
DANIEL A. SMITH
650 Poydras Street, Suite 2345
New Orleans, Louisiana 70130
(504) 581-6700

JOHN M. SINGLETON
General Counsel
INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS
700 Maritime Boulevard
Linthicum Heights, Maryland 21090
(410) 850-8700

Attorneys for Respondent

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30442
SUMMARY CALENDAR

STUART H. SMITH, JR.,

Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

(00-CV-1878-B)

(Filed Jan. 03, 2002)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:[1]

In this appeal, we review a district court's denial of a motion to set aside a judgment for fraud upon the court under Rule 60(b) of the Federal Rules of Civil Procedure.

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

For the following reasons, we affirm the decision of the district court.

I

On October 3, 1992, Appellant Stuart H. Smith, Jr., was serving as third mate aboard the *S/S Stonewall Jackson*, an oceangoing cargo vessel owned and operated by Appellee Waterman Steamship Corporation ("Waterman") and berthed in the Port of New Orleans. On that day, the vessel was attempting an undocking maneuver, during which Smith was assigned to the vessel's stern and was instructed to estimate and report to the bridge the distance from the vessel to the wharf. During the maneuver, the *Stonewall Jackson* made contact with the dock, and the allision caused damage to both vessel and dock.

Waterman reported the incident to the Coast Guard, which conducted an investigation. Waterman also submitted to the Coast Guard a Form CG-2692 that briefly described the incident. The Form CG-2692 indicated that all equipment aboard the vessel was in good working order at the time of the accident, but the parties debate whether the astern servo valve was working properly at the time of the accident.[2] After its investigation, the Coast Guard concluded that Smith failed to relay correct distance information to the bridge and that this failure was the primary cause of the allision. On October 4, 1992, Waterman terminated Smith's employment.

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[2] The astern servo valve can affect the vessel's movement. *See* Appellant Br. at 7-8.

On July 16, 1993, Smith sued Waterman for wrongful discharge in the Eastern District of Louisiana. The district court concluded that Smith was employed at will and could be discharged with or without cause. The court further concluded that Smith was not wrongfully discharged and granted Waterman's motion for summary judgment. *Smith v. Waterman Steamship Corporation, et al.*, No. CA-93-3207-I (E.D. La. Jan. 5, 1994). The Form CG-2692 was never submitted to the court, and the court never relied upon it.

Smith then appealed to this Court. For the purposes of his appeal, we assumed *arguendo* that Smith could only be discharged for just cause but also concluded that no genuine of material issue of fact existed as to whether Smith was wrongfully discharged. Accordingly, we affirmed the decision of the district court. *Smith v. Waterman Steamship Corporation, et al.*, No. 94-30174 (5th Cir. Sept. 8, 1994). The Form CG-2692 was never submitted to this Court, and this Court never relied upon it.

In the present suit, Smith asked the district court to set aside the earlier judgment under Rule 60(b), arguing that the Form CG-2692 constituted a "fraud upon the Court" because it stated that all equipment aboard the vessel was in good working order at the time of the accident and there is some debate as to whether the astern servo valve was in such order. R. at 331. The district court concluded that there was no fraud upon the court. The court found that, because the allegedly fraudulent Form CG-2692 was neither submitted to nor relied upon by the district court or this Court in the prior litigation, there was no link between the information allegedly missing from the form and the judgments entered in the earlier

lawsuit. Thus, the district court denied Smith's Rule 60(b) motion. Smith appealed.

II

Rule 60(b) of the Federal Rules of Civil Procedure allows a court to set aside a judgment for fraud upon the court. This Court has stated time and again that it will review a district court's Rule 60(b) ruling solely for an abuse of discretion. *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 394 (5th Cir. 2001); *In re Al Copeland Enterprises*, 153 F.3d 268, 271 (5th Cir. 1998); *Ergo Sicence v. Martin*, 73 F.3d 595, 599 (5th Cir. 1996). Furthermore, when reviewing the denial of a Rule 60(b) motion, this Court does not review the underlying judgment. *Halicki v. Louisiana Casino Cruises*, 151 F.3d 465, 470 (5th Cir. 1998); *Williams v. Chater*, 87 F.3d 702, 705 (5th Cir. 1996); *Schewegmann Bank & Trust Co. v. Simmons*, 880 F.2d 838, 844 (5th Cir. 1989).

Rule 60(b) provides an extraordinary remedy because it can weaken the principle of finality and "the desire for a judicial process that is predictable." *Carter v. Fenner*, 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Company, Inc.*, 894 F.2d 157, 160 (5th Cir. 1990)). Thus, Rule 60(b) relief based on fraud upon the court is reserved for only "the most egregious misconduct." *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989). Fraud upon the court is a narrow concept that should include only those types of fraud that do, or attempt to, "defile the court itself," or frauds that are "perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for

adjudication." *Kerwit Medical Products, Inc. v. N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980). In *First National Bank v. Lustig*, 96 F.3d 1554 (5th Cir. 1996), this Court further described the kinds of misconduct that could constitute a fraud on the court:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Id. at 1573 (internal quotation marks and citations omitted). The very first test for fraud on the court under Rule 60 is "whether the action in question prevented a party from fully and fairly litigating its case." *Id.*

Smith does not, and cannot, complain that there was a nondisclosure *to the court* of facts allegedly pertinent to the matter before it. He argues that the Form CG-2692 was a fraud upon the court in the prior litigation. As the district court noted below, the Form CG-2692 was never submitted to either the district court or the appellate court in the prior litigation. Therefore, the Form CG-2682 could not have been a nondisclosure to the court.

In essence, Smith complains that there was a nondisclosure *to the Coast Guard* of facts allegedly pertinent to the matter before the court. Given our decision in *First National Bank*, such a nondisclosure would constitute a

fraud upon the court in only the rarest of circumstances. Even if the facts allegedly omitted from the Form CG-2692 were pertinent to the matter before the district and appellate courts in the prior litigation, the omission did not prevent Smith from fully and fairly litigating his case. Neither court considered the Form CG-2692. In fact, the form had absolutely no bearing on the district court's earlier conclusion that Smith was employed at will, a conclusion with which this Court took no issue on appeal.[3]

The district court concluded that the link between the alleged nondisclosure on the Form CG-2692 and the judgment entered in the earlier lawsuit was insufficient to establish a fraud on the court. We find no error in the district court's reasoning. We certainly find no abuse of discretion.

III

Accordingly, we AFFIRM the district court's denial of Smith's Rule 60(b) motion to set aside the prior judgment.

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[3] It should go without saying that a court assuming a point *arguendo* for the purposes of appeal does not hold on that point. Nevertheless, in his complaint, Smith mischaracterizes this Court's opinion in the earlier appeal as "noting that the Collective Bargaining Agreement under which Smith was employed provided that he could only be discharged for just cause." R. at 326; *But see Smith v. Waterman Steamship Corporation, et al.*, No. 94-31074 (5th Cir. Sept. 8, 1994) ("*For purpose of this opinion*, we will *assume arguendo* that the collective bargaining agreement between Smith's union and Waterman is sufficient to invoke 46 U.S.C. § 10313(c) and that Smith could only be discharged for just cause.") (emphasis added).

EXHIBIT
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[LOGO] **International Organization**
Masters, Mates & Pilots

P.O. Box 37273, Tucson, AZ 85740/
Tel. No.: (602) 297-4100/
Fax No.: (602) 297-4105

TIMOTHY A. BROWN
International President

JAMES T. HOPKINS, [Illegible]
International Secretary-Treasurer

ERNEST ALLEN COHEN, ESQ.
General Counsel

January 11, 1994

Ralph E. Smith, Esq.
203 Carondelet St.
Latter & Blum Bldg., Suite 811
New Orleans, LA 70130-3017

RE: Stuart Smith Grievance – M/V Stonewall Jackson, discharge as Third Mate, collision of vessel with pier while departing

Dear Mr. Smith:

Your letter dated December 13, 1993 is acknowledged.

I have also received from Mr. Spelman of the law firm of Lambos & Giardino a copy of an Order by a United States District Judge for the Eastern District of Louisiana, dated January 4, 1994 which grants summary judgment in favor of Waterman Steamship Corp. against Stuart Smith.

You are correct that the claim by Mr. Smith in connection with the captioned incident was against Waterman

Steamship Corp., not Lykes Brothers. In all other respects, my letter to you of December 6, 1993 represents the position of MMP and is confirmed by this letter.

Your letter of December 13, 1993 is in error in the statement in the last sentence of the second paragraph that the International "refused to press the grievance on behalf of Mr. Smith". For your convenience I enclose a copy of my letter to you dated June 28, 1993 in which I state that "The processing of this grievance has been postponed at the request of the member pending completion of the Coast Guard investigation."

Your letter to me of June 21, 1993 was treated by my letter of June 28th as a request that MMP proceed with the processing of Mr. Smith's grievance.

My letter of June 28, 1993 then requested that you furnish a copy of the Coast Guard file and other relevant materials to Captain Holdeman so that he [may] go forward with the grievance process. The letter of June 28, 1993 further stated that "If you would like to furnish a copy of the Coast Guard file to me, I will review it and be in a position to consult with Captain Hopkins, should the matter not be resolved at the Port level."

I received no further communication from you until I received your November 17, 1993 letter calling upon the International and/or Waterman to provide a defense against a counterclaim which had been asserted by Waterman in the litigation which you brought on behalf of Mr. Smith and which was the subject of the grant of summary judgment against Mr. Smith.

It would appear from the Order of January 4, 1994 that you did not assert contract rights pursuant to the

collective bargaining agreement, but chose instead to sue based on common law theories of wrongful discharge. Apparently your choice in this matter was to waive all claims pursuant to the collective bargaining agreement with regard to the incident so as to avoid the arbitration provisions of the collective bargaining agreement. The Court determined that under common law, Mr. Smith was an employee at will and, therefore, dismissed Mr. Smith's Complaint.

One of the reasons for negotiating a collective bargaining agreement is to modify the common law at-will employment status by contract. Under the collective bargaining agreement, unlike common law, an employee can only be disciplined for just cause. MMP is committed to process grievances of wrongful discharge as requested by its members. MMP is also committed to proceed to arbitration with those grievances that cannot be satisfactorily resolved without arbitration which have a reasonable possibility of success.

Your client made a choice not to provide MMP with the information necessary to determine whether or not to proceed from grievance to arbitration. Given that decision, it is not reasonable at this stage for MMP to take any further action concerning the particular incident involving Mr. Smith.

With respect to any future matters, MMP will continue to vigorously pursue all rights relating to Mr. Smith and other members to the extent such matters are presented to MMP for action.

Sincerely,

/s/ Ernest Allen Cohen
Ernest Allen Cohen
International Counsel

EAC:lm
enclosure
cc: Capt. Timothy A. Brown, International President
Capt. James T. Hopkins, Jr., International Sec.-Treas. and Contracts Enforcement Officer, Offshore Membership Group
Capt. Arthur Holdeman, Vice President, OMG, Gulf Ports